In The

Supreme Court of the United States

October Term, 1976

No. 76-1178

MIGDAD MUSA JWAYYED,

Petitioner,

against

BELL SYSTEM and their Subsidiaries, New York Telephone Company & Pacific Telephone and Telegraph, Communications Workers of America, Union International and District One, Local 1121,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 28, 1976.

Citations to Opinions Below

The opinion by the United States District Court for the Northern District of New York, Hon. Edmund Port, U.S.D.J., is not reported, but is set forth herein in the appendix hereto, A-2-20. The opinion of the United States Court of Appeals af-

firming the decision of the District Court by dismissing the appeal, is not reported, but is set forth herein in the appendix hereto at A-1.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented for Review

1. Whether the District Court erred in finding that Petitioner had failed to sustain the burden of proof in view of concession by defendants that petitioner was continuously subjected to derogatory name-calling.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the Fifth and Fourteenth Amendments to the United States Constitution; Title VII of "The Civil Rights Act of 1964", 42 USC, Section 2000 e, et seq, and 42 USC, Sections 1981 and 1983.

Statement of the Case

Petitioner seeks certiorari from a judgment of the United States Court for the Northern District of New York, Hon. Edmund Port, presiding, dismissing the plaintiff's complaint with costs to the defendants exclusive of attorneys' fees and holding that the defendants individually or jointly did not violate Title 7 of the Civil Rights Act of 1964, 42 USC 1981 or 1983, and from the judgment of the United States Court of Appeals for the Second Circuit affirming the order of the District Court by denying petitioner's pro se application for the assignment of counsel and dismissing the appeal.

1. *Prior proceedings* — Petitioner filed a complaint, pro se, in the United States District Court for the Northern District of

New York on October 15, 1974, alleging violations of his rights under Title VII of the Civil Rights Act of 1964, 42 USC, Section 2000 e, et seq. Petitioner had previously sought relief before the New York State Division of Human Rights and the Supreme Court of the State of New York, Appellate Division, Third Department, without success. His complaint filed in the District Court was timely, following an adverse determination of the Equal Employment Opportunity Commission on July 30, 1974, a copy of which is set forth in the appendix hereto at A-21-23.

Petitioner subsequently retained counsel and an amended complaint was filed seeking lost wages and a permanent injunction restraining defendant New York Telephone Company from denying or depriving petitioner of certain rights because of national origin and religion and against defendant Communication Workers of American Union for failure to represent petitioner properly in grievance proceedings.

Following a number of pretrial motions, a trial was held before Hon. Edmund Port, U.S.D.J. in Auburn, New York. The trial commenced on May 25, 1976 and concluded on May 28, 1976.

2. *Facts* — Petitioner transferred to the New York Telephone Company in Albany, New York, from the Pacific Telephone and Telegraph Company in Los Angeles where he had been employed for approximately four and one-half years on February 15, 1971.

Petitioner was assigned to work as a XB-5 Crossboard Frameman, an operation with which he was not familiar. Petitioner's request to be assigned to work at another location in Albany, on equipment with which he was familiar, was denied.

Petitioner claimed that he was not properly trained in the performance of his assigned duties despite his efforts to obtain training and that fellow employees and supervisory personnel

interfered with the performance of his work by calling him derogatory names relating to his national origin and religion which is that of an Arab Moslem.

The scope of petitioner's complaint covered the period from his commencing work in Albany on February 15, 1971, until the filing of a charge of discrimination before the Equal Employment Opportunity Commission on May 10, 1972. The proof at the trial was limited to this period of time despite the fact that petitioner was subsequently placed on disability and terminated by the New York Telephone Company.

In essence, the proof presented on petitioner's part at the trial established that petitioner was harrassed on a continuing basis during the period of employment, by his fellow employees, based upon his national origin and religion. Among the remarks made to petitioner were those that he was "a dumb Arab", "camel-humper", "mother fucker", and a number of references of a sexual nature about petitioner's wife.

Petitioner testified that he reported many instances of this form of abuse to his supervisor and other management personnel, as well as to the Union, but no investigations were ever instituted to look into his complaints and no action was ever taken to prevent such conduct toward the petitioner.

Petitioner, a naturalized American citizen, testified that he was discriminated against because of his national origin as a Jordanian Arab and also because of his devout faith as a Moslem. Petitioner testified that he had been evaluated positively by management and other witnesses called by petitioner testified that he was an "extraordinarily hard-working employee, very conscientious..." and that his "mechanical work was excellent..." Despite his efforts, which included taking college courses in English at the request of a supervisor, petitioner was denied promotion, given no opportunities or training for advancement, ignored and ostracized by his fellow

employees and supervisors and eventually demoted on February 29, 1972, from frameman to apparatus cleaning man, resulting in a reduction in wages from $161.00 per week to $122.50 per week.

In his decision, Judge Port found that petitioner had failed to sustain his burden of proof as to any of the charges contained in the complaint.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals, in dismissing petitioner's appeal without opinion, left unreviewed the District Court's holding that a continuing course of abusive conduct based on national origin toward petitioner does not constitute a violation of the Civil Rights Act of 1964, 42 USC, Section 2000 e, et seq.

This case presents an important question of federal law which has not been, but should be, resolved by the Supreme Court.

The provisions of 42 USC, Section 2000e-2 establish that:

> (a) It shall be an unlawful employment practice for an employer —
>
> (1) ... to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin...

Section 2000e-2 (c) (3) applies to labor organizations and designates as an unlawful employment practice their acting:

> to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The central issue for review is whether, even the limited favorable findings of name-calling as conceded by defendants and found by the trial judge, are sufficient to have constituted

violations of the Civil Rights Act of 1964, 42 USC 2000e, et seq., and have required the defendants to have presented evidence to overcome the prima facie case established by petitioner.

This Court, in the leading case of *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 411 US 792, 36 L.Ed. 2d 668 (1973), established the unyielding principle that discrimination, subtle or otherwise, would not be tolerated. As in that case, and following the Court's criteria for the establishment of a prima facie case, petitioner herein demonstrated that he belonged to a national origin classification against which respondents could not discriminate and that numerous acts of ethnic derogation were practices against him by employees and supervisory personnel of respondents without the effective intervention of respondents.

Under such circumstances, it was incumbent upon respondents to have prevented or curbed such discriminatory practices, or establish at the trial that such practices did not cause any interference in petitioner's productivity which was their pretext for the demotion, about which, inter alia, petitioner complained.

Once petitioner made out his prima facie case, which he, in fact, did, the respondents were obliged to offer proof that either the acts complained of did not occur and if they could not do this, as is the case herein, that such acts did not sufficiently interfere with petitioner's work performance. In *McDonnell Douglas, supra*, at p. 802, this Court noted that under circumstances where a prima facie case is established:

> The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection.

Respondents herein were not required to assume this burden by the trial judge below thereby causing petitioner to be denied his rights under the law.

Since this Court's decision in *Griggs v. Duke Power Co.*, 401 US 424, 28 L.Ed 2d 158, 91 S.Ct. 849 (1971), there have been a rapidly emerging number of cases involving the interpretation and application of 42 USC, Section 2000e, et seq. Most of these cases have been class actions brought on behalf of a large number of plaintiffs and many of the decisions that followed have eradicated individuous forms of discrimination which previously had preserved a status quo of limited opportunity for minority persons. That the instant case involves but one person, an Arab Moslem, makes it no less significant. In fact, the fundamental issue to be decided will have an impact on almost every worker in the nation.

This case presents a question to this Court which has not yet been decided, and that is whether an employee can expect to experience a certain quality of working conditions free from the degrading effect of bigotry.

The history of advancement of better working conditions for workers in this country has very much been a history of judicial overview and protection. From the early cases involving children and women who were freed from the interminable hours of work in sweat shops to contemporary cases involving the Occupational Health and Safety Act, there has been a concern for the quality of the working environment. On many occasions these laws and judicial decisions have imposed considerable burdens upon the employer, but it has been felt that the price was not too great to pay for decent working conditions for everyone.

This country has stood for many lofty principles in the minds of peoples around the world. Millions of them have left their homes abroad to come here and start a new life. Many have succeeded and have made great contributions. That many have failed because of obstacles placed in their path by the spectre of discrimination is something that must be changed.

In the case before this Court, petitioner has taken extraordinary steps to be vindicated in his claim that the laws of this country, designed to protect him from unfair employment practices, have been violated. It may be said that the District Court judge was correct in several of his findings that discrimination was not proven by a preponderance of credible evidence. After all, discrimination, widespread as it is, is difficult to prove. However, the trial judge did find that the existence of conduct which was characterized as "banter", "razzing" and "shop talk", and in so doing dismissed such acts as not rising to the level of discrimination under the law. Petitioner submits that the judge was in error in this regard and furthermore, even where he did not find such acts to be discriminatory per se, that he was obligated to have required the employer and the union to have offered evidence that such conduct did not cause petitioner to be sufficiently distracted from his work so as to have affected his performance.

In the absence of such proof, the petitioner has sustained his burden and the demotion about which he complained allegedly based on performance, must be viewed as a mere pretext for the underlying reason which was because he was an Arab Moslem or in the alternative, because he complained about discrimination whether or not his claim was valid.

Retaliation by an employer against an employee who chooses to assert his rights to prevent alleged discriminatory conduct is also violative of 42 USC, Section 2000e, et seq. See *EEOC v. Kallir, Phillips, Ross, Inc.*, 401 F Supp 66 (S.D.N.Y. 1975), *Borela v. U.N. Corp.*, 462 F 2d 149, *Tramble v. Converters Ink Co.*, 343 F Supp 1350. The trial judge erred in not requiring respondents to offer proof to establish that petitioner's demotion was not a reprisal for his complaints whether or not they were valid.

Yet another error at the trial was the absence of a requirement by the District Court Judge for the respondents to establish that

the evaluations upon which the demotion was allegedly based were valid and not merely subjective observations. The actions of respondents need not have been intentional in order for the Court to have either required evidence to have been submitted by respondents or to have made findings favorable to petitioner.

> "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs, supra,* at p 432.

While there are few, if any, cases directly on point with respect to discrimination based upon national origin and religion, the principles that have evolved in similar contexts, as referred to herein, warrant a reversal of the decisions below and the granting of an opportunity to petitioner to have a new trial wherein respondents would be required to offer evidence to establish that the petitioner's demotion was not discriminatory nor a reprisal for his complaints.

Conclusion

The petition for a Writ of Certiorari should be granted.

Dated: January 21, 1977

Respectfully submitted,

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APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS
Second Circuit

PRO SE
10/26/76
76-7300

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of October, one thousand nine hundred and seventy-six.

Migdad Musa Jwayyed,

Appellant,

v.

Bell Telephone System, et al.,

Appellees.

A motion having been made herein by Appellant pro se for the assignment of counsel

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied and the appeal is dismissed.

/s/ J. EDWARD LUMBARD
J. Edward Lumbard

/s/ WILLIAM H. MULLIGAN
William H. Mulligan

/s/ ELLSWORTH VAN GRAAFEILAND
Ellsworth Van Graafeiland

WHM EVG JEL *Circuit Judges*

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MIGDAD MUSA JWAYYED,

Plaintiff,

against

BELL SYSTEM and their subsidiaries, N. Y. TELEPHONE CO., PACIFIC TELEPHONE AND TELEGRAPH CO. and COMMUNICATIONS WORKERS OF AMERICA, UNION INTERNATIONAL and DISTRICT ONE, LOCAL NO. 1121,

Defendandts.

74-CV-432

DECISION OF HON. EDMUND PORT, in the above-entitled matter on the 28th day of May 1976 at the Federal Building, Auburn, New York.

APPEARANCES:

JOHN C. TOBIN, ESQ., 174 Washington Avenue, Albany, New York, BY: JAMES DURANT, ESQ., of Counsel, Appearing in behalf of the Plaintiff.

SAUL SCHEIR, ESQ., 1095 Avenue of the Americas, New York, New York 10036, Appearing in behalf of the New York Telephone Company.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER and JAMES, ESQS., 1 Niagara Square, Buffalo, New York. BY: RICHARD LIPSITZ, ESQ., Appearing in behalf of

Opinion of the United States District Court for the Northern District of New York

Communications Workers of America, Union International and District 1, Local 1121, Defendants. (None of the above Counsel present at this proceeding.)

THE CLERK: Migdad Musa Jwayyed versus Bell System and their subsidiaries, et al, 74-CV-432.

THE COURT: I think that the record should show that the proof was concluded yesterday in this case, that the Court entertained arguments and motions at the conclusion of the proof and advised Counsel and litigants that the case would be recessed until 1 o'clock today for the purpose of dictating my findings of fact and conclusions of law on the record.

Subsequent to the adjournment of Court, I returned to the Courtroom at the request of all of the attorneys who asked leave of the Court to absent themselves voluntarily from this session of Court. They stated, in substance, that they would procure a transcript of the proceedings from the Court Reporter which would suffice for their purposes. The record should show, however, that the plaintiff, Mr. Jwayyed, is present in Court.

I have examined my notes of the trial. I have reviewed, in addition to my notes, the exhibits that were offered. I have examined the authorities, and I find as follows:

The plaintiff is a citizen resident of New York and was at the time of the commencement of this action; that at all of the times hereinafter mentioned he was a naturalized citizen of the United States, and according to his description of himself, a Jordanian Arab Moslem by birth; that he was employed by the New York Telephone Company hereinafter, New York Tel, between February 15th, 1971 through the year 1974. The defendants, Communications Workers of America, International and District One, Local 1121, hereinafter referred to respectively as

International or Local as distinguishing between them. The International Communications Workers of America and the District and Local 1121, are labor organizations within the meaning of 42 U.S.C. Section 2000e

The plaintiff, during the period referred to, was an employee within the meaning of that act. The New York Telephone Company at all times was an employer within the meaning of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e.

On or about March 6th, 1972, the plaintiff filed a complaint with the New York Human Rights Commission under Complaint Number IV-CN-528-72 with himself as complainant, the New York Telephone Company, James Burton and Ralph Holbrook as respondents.

The crux of the complaint was alleged employment discrimination on the part of the respondents due to national origin. The charge was dismissed on the ground of no probable cause, the director of the division finding from the evidence that the plaintiff was demoted because of substandard work performance. On appeal the determination was affirmed and subsequently affirmed by the Appellate Division of the New York State Supreme Court reported at 42 App. Div. 2nd 363, 3rd Department 1973.

Thereafter on or about March 10th, 1972, the plaintiff filed a charge with the Equal Employment Opportunity Commission naming as parties, New York Telephone Company, its president; James Burton, Foreman; Ralph Holbrook, Wire Chief, Kenneth Rapsard, Wire Chief; The Communications Workers of America, District Local No. 1121, George Miller, President, alleging he was denied a promotion, denied overtime, called derogatory names relating to his national origin and causing him to suffer personal injuries, that he was demoted,

that he was not given an opportunity for training for advancement while others were, and that the terms and conditions of employment were not adhered to and that the union refused to represent him properly, that he had been harassed and segregated in his job assignment by placing him alone in the building, and that he requested an evaluation in writing from the supervisor which was refused, later given to him, that the evaluation was false, that he contended his actual work performance was good, and that after the State had started its investigation, the performance of his duties were represented falsely. He charges that all the discrimination against him was because of national origin, and that in considering whether or not he should be demoted, the company did not consider his employment record with the Pacific Telephone and Telegraph Company.

Those are the substance of the charges made before the Equal Employment Opportunity Commission. Those charges encompassed the period from February 15th, 1971 until March 1, 1972, the charges being filed on or about May 10th, 1972.

The charges were dismissed subsequently on or about August 1974 on the ground of no reasonable cause and the plaintiff was advised by the Equal Employment Opportunity Commission in a letter that he was given ninety days within which to bring suit in the Federal District Court. That was followed, the right to sue letter was followed timely by the institution of the present lawsuit.

On an examination of the evidence after the hearing, I find that the plaintiff has failed to sustain his burden of proof as to any of the charges contained in his complaint in this action. Taking them up individually, I find that he has failed to establish by a fair preponderance of the evidence that he was discriminated against in any manner by reason of his national

origin or religion. The evidence shows that his denial of any promotion and his allegation that he was denied training given to others is not supported by the proof. The proof shows, based on the company evaluations made contemporaneously with the performance of his work, that his work performance as a frame man was poor rather than excellent as claimed by him, that he was given the same training that all other frame men in which job he was employed were given, that he was not promoted to a switchman, but that the failure to promote him in no way related to his national origin or his religion.

The testimony demonstrated that there were no schools, company schools maintained to train frame men. Frame men received training on the job from their supervisors or from their fellow employees, that his supervisor and fellow employees provided reasonable training, and apparently, more than what was afforded other employees. He alleges an invasion of his privacy by what he calls tapping his telephone lines and interfering with his telephone calls. I find no credible evidence to support that or to support his charge that his mail was opened.

He claimed that a bill from the West Coast, I don't know what kind of a bill, was opened. There is no evidence that a complaint with reference to this incident was made to anyone, and there is no evidence that if it occurred, that it was done intentionally to pry into his affairs. There is no evidence other than his statement that others were listening in on his conversations. The evidence is that there were six button phones available for the employees for official use and that, of course, if the button is pushed in on any particular line, a conversation could be overheard. There is no evidence that that occurred, and if it did occur, it was a fleeting interference and accidental in nature, not with the intention of interfering with the plaintiff's right of privacy.

Other than his own statement, which is difficult to credit, and which is not credited, there is no evidence of any listening in on his conversations. He deduces that other employees were listening to his conversations beacuse he observed them on extension phones at the same time that he was using an extension phone. I suppose that is a two-way street. The employee on the other extension could deduce as well that he was listening to their conversation rather than vice versa, although there is no support for either deduction. He makes the blanket allegation that his home phone was tapped. I find no evidence to support that claim.

The plaintiff claims considerable harassment, or as he phrased it, aggravations because of his national origin or religion, or relating to his national origin or religion. The proof shows a few instances of vulgar namecalling back and forth between employees. I credit the evidence that this was not a consistent course of conduct on either the part of the plaintiff or the part of his fellow employees. The fellow employees seem to accept it, in some instances, rather vulgar references to their activities or to their national origin as not particularly meaningful, but as the normal byplay and intercourse of men working in the atmosphere in which they were working. That is, that an employee testified that he might have, as claimed by the plaintiff, referred to the plaintiff as a dumb Arab, but it was an isolated instance, and I gather that it was done in the same vein that another employee stated he was referred to frequently as a blue-eyed guinea, and in the same manner that one might use the expression, not uncommon among workers, of a dumb Irishman or a hard-headed Dutchman. No doubt the plaintiff, because of his background, different background from his fellow employees, was more sensitive to this sort of a situation than they were, and when it was called to the attention of both the

company and the union, efforts were made, reasonable efforts were made to have that kind of horseplay discontinued as it involved the plaintiff.

I think that the plaintiff, in his own mind, exaggerated the incidents as they related to him personally. For instance, he saw in some sort of a fire that occurred on the premises, a deliberate effort to hamper him in his work, a seemingly incredible proposition to the Court. He saw and testified that the fellow employees were making references to his religious background and deliberately harassing or causing him aggravation by leaving a trail of crosses, crucifixes, I assume, or symbols of crucifixes in his path. He was not specific nor was he drawn out in this regard by Counsel.

On examination of other company employees produced by the plaintiff, it appears that the crosses that are being referred to are marks to a vertical line and horizontal line being crossed so that they might, in some instances, represent a crucifix or a cross having a religious symbolism, although in fact, it was merely a work symbol to denote that certain connections had been made in this large board having all sorts of electrical connections, and the symbol was made on the work order to indicate that that part of the work order had been performed.

Now, to the plaintiff's mind, that represented a religious symbol, which it was not at all, and it was done for the deliberate purpose of harassing him.

Another instance of the manner in which these things became affixed in the plaintiff's mind as distinguished from what they actually were, is, he took great umbrage at another sign that was posted during the strike, apparently, for the purpose of restraining the administrative personnel who were doing craft work during the strike from tampering with equipment that shouldn't be touched. The sign was quoted as saying, "Keep

your cotton-picking hands off this or that", and somehow or other in his mind, that became an affront directed at him which it clearly was not meant to be. He charged a supervisor with changing a wire color code which would completely disrupt the operation of this dial system, and it just isn't credible. I can't credit it, although I don't think that the plaintiff was deliberately trying to deceive the Court. I think in his mind he believed it.

Again, in relation to the general charge that drinks contrary to the tenets of his religion with alcoholic beverages were being forced on him, when the testimony is all in, it appears that that complaint is derived from an isolated incident when he returned from his native land with a new bride and appeared at a restaurant in which his supervisor was having lunch, and his supervisor, in a friendly gesture, I am sure, offered to buy both he and his wife a drink. As a matter of fact, the testimony is that they accepted the offer, although not to have any alcoholic beverage which the plaintiff said would be contrary to the tenets of his religion, but he did accept a Coke in celebration of his recent marriage.

There was a rubber stamp with the legend, "Made in Italy" that had been given to a fellow employee at a going away party when he left his job with the Telephone Company in Long Island and came up to Albany. That stamp apparently was accessible to all employees and was used in a bit of horseplay to stamp orders and various documents that were in the hands of various employees. Somehow or other, by a mental process which was not explained, the plaintiff felt that that too was directed at him in derogation and belittlement of either his religion or his national origin.

I have gone into considerable detail as to these instances because the plaintiff's charges were of such a blunderbuss

nature, and because he paints with a broad brush, makes these charges, scatters them around quite freely. It can't be credited.

The general atmosphere in the shop in which he worked among the relatively few employees with whom he came in contact seemed to be one of friendliness toward him. The employees evidenced no actions that would indicate ill will toward the plaintiff. For instance, one of his co-workers, the union steward, Laveroni, testified, and all the testimony on the part of the fellow employees were virtually without contradiction, but he testified without contradiction, I assume there is no contradiction that could be made, that he appeared as a witness on behalf of the plaintiff at a citizenship proceeding, that the plaintiff didn't like to go out of his place of employment to have lunch with the other workers, so that when Laveroni went out, he very often brought the plaintiff's lunch back with him for the plaintiff. The same thing was true of Strasi, another fellow worker, another fellow worker who was alleged to have kicked the plaintiff as evidence of hostility towards him as an Arab or Moslem, would drive the plaintiff to the bus stop so that he wouldn't have to walk there from the shop in inclement weather, and that remained uncontradicted.

The general impression is that most of the employees, if not all, did not know, in fact, the plaintiff's religion. And in any event, he was not treated differently because of his religion. It is interesting to note that plaintiff's religion, similar to the Jewish traditional religion, forbids the consumption of ham as well as alcoholic beverages, and I don't intend to include the alcoholic restrictions in the Hebrew or Jewish religion, but to the men never knowing this, not knowing that it was his religion that prohibited it, necessarily, but knowing that he had said that he didn't want ham or he couldn't eat ham, avoided always bringing him a ham sandwich.

Now, if these fellow employees, in this atmosphere of rough and tumble horseplay of the workshop, were trying to torment the plaintiff, the easiest way to torment him, it seems to me, would be to either try to deceive him in reference to what he was eating by bringing him ham sandwiches or just to torment him with relation to that, and they didn't.

The plaintiff himself, it seems, during the course of the events here, indicated a reciprocal friendliness toward his fellow workers and company supervisors. The postcard that he sent from London was certainly a friendly gesture. It explicitly was an extension of his friendship to supervisory staff and his workers.

He found problems with Mr. Burton, Mr. Bytner, the two supervisors on the trial, but his only complaints to them were in generalities about getting workers off his back. But he didn't advise either of them of specific language being used that he testified to in the Courtroom that he finds objectionable. And I credit that testimony because his testimony in the Court started out in exactly the same way, started out with charges of general conspiracy and aggravations, and it was only through persistent questioning and some leading that he broke down the complaints into specific instances.

He complained that he was not given the attention in training to which he was entitled. But I find that he received more instructions than a frame man of his experience should require, and that he received it as promptly as circumstances would reasonably permit, but that his impatience is what generated the idea that he was being discriminated against.

The only testimony, the only credible testimony there is, neither the union intervention, district or local, nor the employer, approved or tolerated any discrimination based on

national origin or religion insofar as the plaintiff is concerned. When any such instances, although even in the cloak of just riding the plaintiff, were brought to their attention, prompt and reasonable action was taken in the circumstances.

There came a time in his employment when he was demoted from frame man to apparatus cleaning man or something of the sort. In any event, it was a job a step lower than frame man. He sees it in demotion and contends that it was, again related, to his being an Arab Moslem. The evidence sustains the employer's claim that he was demoted by reason of an unsatisfactory work record. The work evaluation sheets very well demonstrate that. As typical of the operation of the plaintiff's mind, is a claim in the charge made by the State Division of Human Rights that in May of 1971, a three-month evaluation given by Mr. Bytner stated, "I was doing an outstanding job on the frame and he discussed that with me." Now, that, I think, is supported by that report, but it doesn't tell the whole story. I think it indicates that Mr. Bytner found his work in that instance highly satisfactory, that he told him about it to encourage him, very fairly, but that the balance of the instances of evaluation by Mr. Bytner show many errors and much unsatisfactory work. But it was that one report where the word "outstanding" was used that in the plaintiff's mind characterized his entire work history. The facts are that his work history demonstrated on the over-all, unsatisfactory performance.

In connection with the demotion, he charges the union, international and local, with a breach of their duty of fair representation, although it isn't alleged in the complaint in those terms, nor is the jurisdictional basis alleged to support that charge framed in that manner. However, it was considered because I think it is sufficiently alleged to bring the matter in issue. The union, with reference to his demotion, took the

grievance at his behest through the first three steps. The next step is a binding arbitration. Binding arbitration, of course, entails some expense, and the union, in good faith, after examining the evaluation reports and after the first three steps, decided that the case was weak and did not merit taking it to binding arbitration and, accordingly, refused. There is nothing in the evidence that shows that the union acted out of anything but a fair judgment on the facts and that they acted in good faith.

He objects to the fact that he was not transferred from the Washington Avenue office to the State Street office, and then subsequently that he was not transferred back to California. The Washington Avenue office to the State Street office was not accomplished because it was an exchange of employees, an employee going from State Street to Washington Avenue and the plaintiff going from Washington Avenue to State Street, and the State Street employee decided he didn't want the transfer. With reference to the transfer back to California, in spite of the urging by both New York Tel and the union, and in fact, the union urged his transfer to the Western Avenue office as part of the disposition of the grievance, and that that couldn't be accomplished and the power to transfer is within the company, not the union, but back to California there was no possibility of accomplishing that because the Bell System Company in California just didn't accept the transfer.

The denial is that any of these transfers was not related to the plaintiff's religion and national origin but it was dictated solely by the business considerations. They needed the help on Washington Avenue because of the work load. In fact, plaintiff was brought in as an additional worker and the State Street worker refused to accept the job, and Pacific Tel refused to accept the plaintiff.

He alleges, in general conclusory terms, that there was a conspiracy, a denial of just about all of his rights under Title 7 of the Civil Rights Act of 1964. I fail to find any evidence to support any agreement or conspiracy of any kind. I think the conspiracy charge is strictly a figment of the plaintiff's imagination. Not so much imagination as a very active suspicion and an extreme sensitivity to everything around him. I am no psychiatrist, but from the general hearing, it indicates a paranoia. There is nothing, as I have indicated, in the evidence that anyone denied the plaintiff any rights in violation of the Civil Rights Act of 1964, or for that matter, of the additional paragraphs that he threw in of Title 42, being Sections 1981 and 1983, the earlier Civil Rights Act. Of course, 1981, Judge Foley has ruled on in connection with the Pacific Tel case, and I needn't repeat the grounds. It is wholly applicable. 1983, bypassing for the moment, the question of State action, is not supported by the evidence, in any event.

Plaintiff claims that he was discriminated against in relation to overtime, again, because of his national origin and religion. He testified that when an employee refuses to work overtime, he is charged with that overtime on his record in the same manner as though he had actually worked the overtime and earned the overtime income. He says that the other employees who refused to work overtime were not charged with that overtime on the records. There is no other evidence other than his statement to support that charge, which can't be credited. The Telephone Company's records were available. This case is a 1974 case. There is plenty of opportunity for discovery, and in fact, records were produced here in the Court of every nature that were demanded, so that there is no support for that claim. And further, the plaintiff, in response to, I believe it was my question, testified that as far as he was concerned, he never refused

overtime, so that the rule never came into play, so he was never charged with overtime that other employees were not.

The plaintiff, I feel, would like to extend the coverage of the Civil Rights Act of 1964 to cover conduct which the act was not intended to cover. I don't think that the act was intended to turn occasional horse play or bantering into conduct prohibited by the act where it was not a course of conduct condoned or participated in by either the employers or the union, and because the plaintiff was of a particularly sensitive nature or lacks the same kind of background as his co-workers, or because he might be unduly and unreasonably suspicious of the conduct of others.

In this case there is no evidence that he was subjected to a concerted pattern of harassment by workers which the company and the union were aware of and didn't attempt to stop.

Now, the attorneys for the New York Telephone Company have made an application. They made it seriously and they have urged it strenuously upon the Court that they be awarded attorneys fees in the amount of $2500. Based on the statement of Counsel, the amount requested, I find, is reasonable. However, I am going to deny the request for attorneys fees. The criteria for the granting of attorneys fees in an action under the Civil Rights Act of 1964 was set forth succinctly, I think, by the 2nd Circuit in a decision of May 7th, 1976 in the case of Carrion v. Yeshiva University, No. 75-74-81 (2d cir. May 7, 1976) slip op. page 3619. The Court said, "While a successful plaintiff in Title 7 cases is routinely permitted to recover Counsel fees under the Neuman-Northcross Rule, a prevailing defendant should be permitted such fees not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." The Court went on to quote the District Court Judge as follows: "Con-

cededly, discretion should be sparingly exercised in awarding attorneys fees and taxing costs against a Title 7 plaintiff."

In that case the attorneys fees were awarded.

The attorneys for New York Tel take the position that they come within this criteria, recognizing that the awarding of Counsel fees is a discretionary matter with the Court. They take the position that the whole lawsuit is born out of the mind of the plaintiff without any basis in fact, that it is unreasonable, frivolous and that it is vexatious. I feel differently. I think that this plaintiff brought this action in good faith in spite of the fact that I have found against him and I find myself unable to support any of his factual issues, but I am convinced that the action was not brought for the purpose of being vindictive or for being vexatious, but was brought out of a sincere but misplaced belief that he was in fact wronged. I think that that belief was derived from an unwarranted fixation that I am afraid has become more severe during the course of the litigation, but in no way does it detract from the plaintiff's sincerity. He feels that he has been wronged. He feels that sincerely. He evidenced it by the investment and time and money he made going through the Commission proceedings before the Human Rights Commission and going to the Appellate Division in the State Court and going before the Equal Employment Opportunity Division and then coming to this Court with competent Counsel in a case that I am sure must have merited substantial Counsel fees.

So for those reasons, I find the plaintiff is sincere, that the action is not one in which I should exercise my discretion to award Counsel fees against him, and I won't, and I decline to do it and deny the motion for Counsel fees.

In summary I find that the defendants, Telephone Company, Union, Local, International, did not refuse to train the plaintiff

for promotional opportunities because of his religion or national origin, that they did not deny the plaintiff promotional opportunities for the same reasons, that they did not deny the plaintiff opportunities for transfer for those reasons, that they did not deny the plaintiff overtime opportunities for those reasons, that they did not deny the plaintiff the same working conditions as those available to his co-workers for the reasons enumerated.

I further find that the International and Local Union defendants fairly represented the plaintiff in connection with grievances while he was employed by the New York Tel. In short, none of the defendants have committed an unfair labor practice within the meaning of 42 U.S.C. 2000e-2 (a), (c) or (d), or 42 U.S.C. 2000e-3(a).

I conclude that this Court has jurisdiction over the parties and the subject matter of this dispute. In accordance with the foregoing findings of fact, I conclude that the defendants have not participated in or condoned any practices or policies of discrimination against the plaintiff. Therefore, it is the holding of this Court that the defendants individually or jointly did not violate Title 7 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. or 42 U.S.C. 1981 or 1983.

I further conclude that the application of the New York Telephone Company for Counsel fees should be denied and it hereby is denied.

I conclude the judgment in favor of the defendants dismissing the plaintiff's complaint with costs to the defendants exclusive of attorneys' fees should be entered, and the Clerk is directed to enter such judgment in accordance with these findings and conclusions.

The findings and conclusions that I have just dictated on the record should constitute the findings and conclusions of the Court. I believe Counsel have requested copies.

Now, Mr. Jwayyed, I want you to understand that I have given serious consideration to all your claims, that in my judgment, I have been obliged to hold against you.

MR. JWAYYED: Do you mind if I —

THE COURT: No, just a minute. That you have a right to appeal from my judgment just as you appealed in the State Courts, that you consult your attorneys about the advisability of appealing and—

MR. JWAYYED: Judge, I want to bring to Your Honor's attention, one thing, if you please. I would say you have brought the wrong judgment for one reason. Judge Foley said in his order, and I am quoting him, "If you have to bring suit, you have to name the body who held responsibility," which I am. He wants it clear, he underlined it. You have to bring the people who are held in the name of the Equal Employment Opportunity which I am. And, Your Honor, yesterday you never cross-examined the president on it. The complaint was clear. He said you must, he underlined it, and he said you must name him. This is in the Albany office, Supreme Court said we must be sued in the Albany Supreme Court because we did not name, we did not give him the names. He underlines it. Do you want me to show it to you?

THE COURT: No, I have got Judge Foley's opinion.

MR. JWAYYED: Your Honor, he said like this, before you bring a suit, Your Honor —

THE COURT: Wait just a minute. Let me stop you right here.

MR. JWAYYED: Yes, Your Honor.

THE COURT: Just as I told you before, I don't feel it is proper for me to discuss the matter with you in the absence of your attorneys and the other attorneys. None of them are here. I am concerned that you might be making some argument or statement to me, say something which will be detrimental to your interests. Everything you say is being taken down by the reporter. Now, if I am wrong, if I didn't understand Judge Foley's opinion, and I think I did, you will have an opportunity to correct my errors. But I can only decide the way I think I must. Now, I am not going to permit you to say anything more because I am afraid that you might damage your own case.

I will stand in adjournment.

MR. JWAYYED: Judge, I talked to you yesterday. I want to bring Your Honor's attention to this and you did not hear me on it.

THE COURT: That's right.

MR. JWAYYED: If you please, just one single statement Honorable Judge Foley said, and I am quoting him, according to his amended complaint, as amended, it does not

THE COURT: Well, that is why we have a trial.

MR. JWAYYED: Well, Your Honor, we did not cross-examine the president himself whether he is aware of conspiracy or not, did we?

THE COURT: I am not going to continue this discussion. I have told you what to do.

MR. JWAYYED: I know, but the law wasn't clear.

THE COURT: Do you want me to exclude you from the room?

Opinion of the United States District Court
for the Northern District of New York

MR. JWAYYED: Okay, Judge, I want to—

THE COURT: No. Now, that is enough.

MR. JWAYYED: Yes, Your Honor.

THE COURT: All right. My law clerk has called to my attention that I failed to comment with reference to the claim of the union's not taking any steps in connection with the demotion. But in fact, they did. They took the grievance through the third step, and it was at that juncture that they determined that the facts do not merit going to arbitration. I think I discussed that, but if I didn't, I am supplementing the record by that, and in my judgment, they acted in good faith on a reasonable basis and they acted reasonably and not in violation of any of the plaintiff's rights.

CERTIFICATION

I, George T. McGloine, Official Court Reporter for the United States District Court in and for the Northern District of New York, do certify this to be a true and accurate transcript of the stenographic record of the foregoing taken at the time and place noted in the heading hereof.

/s/ GEORGE T. McGLOINE
George T. McGloine
Official Court Reporter
United States District Court
Northern District of New York

Albany, New York

July 28, 1976

DETERMINATION OF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1 WEST GENESEE STREET
BUFFALO, NEW YORK 14202
(716) 842-5170

CASE NO. YBU5-020
CHARGE NO. TBU4-0664

Migdad Musa Jwayyed
Post Office Box 8686
Albany, New York 12208

Charging Party

New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036

Communication Workers of America
District One, Local No. 1121
29 Fuller Road
Albany, New York 12205

Respondents

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission the following determination as to the merits of the subject charge.

Respondent Company and Union are an employer and union respectively within the meaning of Title VII and the timeliness deferral and all other jurisdictional requirements have been met. The New York State Division of Human Rights issued a No Probable Cause determination which was affirmed by the

Appeal Board and subsequently confirmed by the New York State Supreme Court — Appellate Division, Third Judicial Department.

Charging Party alleges that the Respondent Employer has subjected him to discriminatory treatment and a demotion in job classification in violation of Title VII of the Civil Rights Act of 1964 because of his national origin (Arabian).

Charging Party further alleges that Respondent Union's failure to represent him is also violative of Title VII of the Civil Rights Act of 1964.

Respondent Employer categorically denies the allegations and maintains that Charging Party was demoted because of sub-standard work performance in accordance with the terms, conditions and privileges accorded other employees.

Evidence of record gathered during investigation of Respondent's terms and conditions of employment substantiate Respondent's denial inasmuch as persons of various national origins have been demoted after failure to meet the requirements of a specific position.

Respondent Union denies the allegation that it failed to represent Charging Party and maintains that representation was accorded Charging Party through the third step of the grievance procedure.

The Commission, in processing the alleged charge of a violation of Title VII of the Civil Rights Act of 1964, as amended, has considered the Determination after Investigation issued by the New York State Division of Human Rights April 25, 1972 which was affirmed by the State of New York Human Rights Appeal Board, Appeal No. 1326, on January 9, 1973.

Additionally the Commission had considered the confirmation of the above Determination before the New York State Supreme Court — Appellate Division, and adopts their findings.

In addition to the materials gathered during the investigation of this charge, we have considered the materials filed by both the Petitioners and the Respondents in Docket 19143 before the Federal Communications Commission.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, he may do so by filing a private action in Federal District Court within ninety days of his receipt of this letter and by taking the other procedural steps set out in the enclosed Notice of Right to Sue.

ON BEHALF OF THE COMMISSION:

/s/ LLOYD G. BELL
Lloyd G. Bell, District Director

DATE: July 30, 1974

Enclosure: (1)
Notice of Right to Sue

No. 76-1178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

MIGDAD MUSA JWAYYED,

Petitioner,

against

BELL SYSTEM and their Subsidiaries, New York Telephone Company & Pacific Telephone and Telegraph, Communications Workers of America, Union International and District One, Local 1121,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM FOR NEW YORK TELEPHONE COMPANY IN OPPOSITION

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Attorneys for
NEW YORK TELEPHONE COMPANY
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(212) 395-6138

Dated: March 21, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1178

MIGDAD MUSA JWAYYED,

Petitioner,

against

BELL SYSTEM and their Subsidiaries, New York Telephone Company & Pacific Telephone and Telegraph, Communications Workers of America, Union International and District One, Local 1121,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM FOR NEW YORK ~~TELE~~PHONE COMPANY IN OPPOSITION

The petition for a writ of certiorari should be denied because (1) it seeks, essentially, review of the District Court's findings of fact, (2) the decision of the District Court was manifestly correct as a matter of law and in accord with prevailing authority, and (3) the petition presents no important question of federal law.

1. The District Court made express findings of fact with regard to the matter of "derogatory name-calling" referred to in the question presented by Petitioner for review. Thus, while the District Court found that the evidence disclosed "a few instances of vulgar namecalling back and forth between employees" (Pet., A-7), which it characterized as "horseplay," the court based its decision on its further finding that the Respondent employer (as well as the Respondent unions) took reasonable steps to deal with the matter:

> ". . . When [the name-calling] was called to the attention of both the company and the union, efforts were made, reasonable efforts were made to have that kind of horseplay discontinued as it involved the plaintiff." (Pet., A-7-8)
>
> • • •
>
> "The only testimony, the only credible testimony there is, neither the union intervention, district or local, nor the employer, approved or tolerated any discrimination based on national origin or religion insofar as the plaintiff is concerned. When any such instances, although even in the cloak of just riding the plaintiff, were brought to their attention, prompt and reasonable action was taken in the circumstances." (Pet., A-11-12)

These findings of fact are dispositive of the issue presented by Petitioner and should not be reviewed.

2. The District Court held that a few instances of name-calling by fellow employees, characterized as "horseplay," could not support a finding of discrimination against an employer who did not approve or condone such name-calling, but who rather took prompt and reasonable action to have such activities discontinued. This holding was

manifestly correct as a matter of law and is in accord with reported federal decisions dealing with the question. *Howard* v. *National Cash Register Co.*, 388 F. Supp. 603 (S.D. Ohio 1975); *Fekete* v. *United States Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973). See also *State Division of Human Rights* v. *Henderson*, 49 App. Div. 2d 1026, 375 N.Y.S. 2d 497 (4th Dept. 1975).

3. In view of the District Court's factual findings and the fact that its decision was in accord with prevailing case law, the petition presents no important question of federal law. Put most charitably, the question Petitioner presents is whether an employer engages in unlawful discrimination when fellow employees engage in a few instances of horseplay in the form of name-calling and when the employer makes prompt and reasonable efforts to have such conduct by its employees discontinued. This is hardly a burning question of federal law which requires the time and effort of this Court to decide.

Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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WILLIAM P. WITMAN
MICHAEL HERTZBERG

Attorneys for
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, New York 10036
(212) 395-6138

Dated: March 21, 1977

In The

Supreme Court of the United States

October Term, 1976

No. 76-1178

MIGDAD MUSA JWAYYED,

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against

BELL SYSTEM and their Subsidiaries New York Telephone and Telegraph, Communications Workers of America, Union International and District One, Local 1121,

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

BRIEF IN OPPOSITION BY RESPONDENTS COMMUNICATIONS WORKERS OF AMERICA, UNION INTERNATIONAL AND DISTRICT ONE, LOCAL 1121

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TABLE OF CONTENTS

APPENDIX

TABLE OF CASES

In The

Supreme Court of the United States

October Term, 1976

No. 76-1178

MIGDAD MUSA JWAYYED,

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against

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On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

BRIEF IN OPPOSITION BY RESPONDENTS COMMUNICATIONS WORKERS OF AMERICA, UNION INTERNATIONAL AND DISTRICT ONE, LOCAL 1121

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of New York, Hon. Edmund Port, U.S.D.J., is unreported, but is set forth in petitioner's appendix at A-2-20. The opinion of the United States Court of Appeals dismissing petitioner's appeal from the District Court decision and denying

his application for appointment of counsel is unreported, but is set forth in petitioner's appendix at A-1.

QUESTIONS PRESENTED

1. Has petitioner complied with the time limits prescribed by Supreme Court Rule 13(2)? If not, has petitioner shown good cause for an extension of such time?

2. Did the District Court commit reversible error based upon the record before it?

STATEMENT OF CASE

This case was commenced against the respondents Communications Workers of America, Union International and District One, Local 1121 (hereinafter referred to collectively as "CWA") and others. The portions of the complaint directed against the CWA alleged the CWA violated the Civil Rights Act of 1964, Title VII (29 U.S.C. §2000[e] et seq.); 42 U.S.C. 1981 and 1983 and the Fifth and Fourteenth Amendments to the United States Constitution by breaching its duty fairly to represent the petitioner with regard to his demotion grievance in that it refused to take said grievance to binding arbitration. In addition, petitioner alleged the CWA discriminated against the petitioner, in violation of the foregoing constitutional and statutory provisions.

Following petitioner's filing and service of an amended complaint and decisions on various pretrial motions, trial was held before the Honorable Edmund Port, U.S.D.J. in Auburn, New York. The trial commenced on May 25, 1976 and was concluded on May 28, 1976. Petitioner then filed a notice of appeal from said decision dismissing the complaint with the United States Court of Appeals for the Second Circuit based upon petitioner's failure to comply with the time limits set forth in its Scheduling Order of July 1, 1976 (annexed hereto in the

appendix at page R-1) that Court granted an order dated October 26, 1976, annexed to the Petition at page A-1, dismissing his appeal. The denial of petitioner's application for appointment of counsel was based in part on the Reply Affidavit of Stuart M. Pohl sworn to on July 28, 1976 and annexed hereto commencing at page R-3 of Respondent CWA's Appendix.

REASONS FOR DENYING WRIT

I. *Petitioner has failed to comply with the time requirements of the Supreme Court Rules and 28 U.S.C. §2101.*

Supreme Court Rule 22 (3) provides a petition for a writ of certiorari in cases such as the present one ". . . shall be deemed in time when it is filed with the clerk within the time prescribed by law." 28 U.S.C. §2101, as it applies to the present case provides:

> "(c) Any other appeal or any *writ of certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review *shall be taken or applied for within ninety days after the entry of such judgment or decree.* A justice of the *Supreme Court, for good cause shown, may extend* the time for applying for a writ of certiorari *for a period not exceeding sixty days.*" (emphasis supplied)

As indicated previously, the order of the Second Circuit was entered on October 26, 1976. Thus, pursuant to 28 U.S.C. §2101, as well as Supreme Court Rule 34(1) *petitioner's ninety days* within which to apply for a writ *expired* on or about January 24, 1977. Petitioner's petition for a writ was docketed by the Supreme Court Clerk on February 24, 1977 in an untimely fashion and, therefore, must be denied.

An additional reason for denying the present petition as untimely is found in the fact petitioner has failed properly to

apply for or obtain an extension of time from this Court to file such petition. Specifically, petitioner has failed to file an application for extension which complies with the requirements of Supreme Court Rule 22(4). In addition, if petitioner has filed such an application, such application also had to be timely in accordance with Supreme Court Rule 34(2) and had to be served on all parties including the CWA as required by Rules 34(3) and 50(2). Neither the CWA, nor its counsel, has ever received notice of such an application presumably because none has been made. Thus, having failed to properly apply for or demonstrate justification for such extension, the present petition must be dismissed as untimely.

II. *Petitioner's contentions as to the District Court's decision lack merit and should not be reviewed by this Court.*

Petitioner contends this Court should grant the writ applied for because:

> "This case presents a question to this Court which has not yet been decided, and that is whether an employee can expect to experience a certain quality of working conditions free from the degrading effect of bigotry." (P. 7)*

This Court should note the District Court squarely met that issue holding:

> "The plaintiff, I feel, would like to extend the coverage of the Civil Rights Act of 1964 to cover conduct which the act was not intended to cover. I don't think that the act was intended to turn occasional horse play or bantering into *conduct* prohibited by the act where it *was not a course of conduct condoned or participated in by either the employers or the union*, and because the plaintiff was

*All references to pages of the Petition for a Writ are cited herein as "P. ".

> of a particularly sensitive nature or lacks the same kind of background as his co-workers, or because he might be unduly and unreasonably suspicious of the conduct of others.
>
> *In this case there is no evidence that he was subjected to a concerted pattern or harassment by workers which the company and the union were aware of and didn't attempt to stop."* (emphasis supplied; A-15).

Contrary to the contentions of counsel for the petitioner discussed at pages 4 and 5 of his Petition, the District Court specifically found each of plaintiff's allegations to be unsupported by the evidence presented. Specifically, the Court found there was not a consistent course of conduct of name-calling by the Employer's employees including petitioner (A-7). In addition, as to Petitioner's contention he reported these name-calling incidents to the Employer and the CWA, the Court specifically found said defendants had acted upon such requests and had made reasonable efforts to have such horse-play discontinued (A-7, A-8). Furthermore, the Court credited the testimony of two supervisors, Burton and Bytner that the petitioner's many complaints to them were lodged only in generalities and didn't advise them of the specific language directed against him by his fellow employees (A-11). Finally, the court, based on the credible testimony presented, specifically held neither the CWA nor the employer approved or tolerated discrimination directed against the defendant (A-11, A-12). Rather, whenever petitioner brought such alleged instances to their attention, they took reasonable and prompt action to have the actions, if any, discontinued (A-12).

Petitioner also contends his testimony with regard to his work performance being excellent should have been credited. However, the Court specifically held the employer's evaluations of petitioner demonstrated his work performance was poor rather than excellent (A-6, A-12). Petitioner's claim that he was denied promotions and training flies in the face of compelling

evidence presented at trial and credited by the Court (A-6, A-11). His additional claim he was ostracized by his fellow employees and supervisors, while not directed against the CWA, was, in any event, discredited by the Court on several occasions (A-10, A-11).

The Supreme Court has uniformly held it will not become involved in resolution of factual issues unless a constitutional claim will depend on said resolution (*Berenyi* v. *District Director, Immigration and Naturalization Service*, 385 U.S. 630 [1967]), especially where such resolution "turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court . . ." (385 U.S. at p. 636).

In the present situation, petitioner's reasons for granting the writ lack merit. First, petitioner concedes the number of favorable findings dealing with *employees* calling the petitioner names were very limited (P. 5). In spite of this, petitioner contends such proof was sufficient to constitute violations of the Civil Rights Act of 1964, 42 U.S.C. §2000 e, et seq. (P. 6). Such contention completely misinterprets the impact of 42 U.S.C. §2000 e-2(c)(3) with regard to the CWA. That section provides:

> "It shall be an unlawful employment practice for a *labor organization* —
> (1) . . .
> (2) . . .
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (emphasis supplied).

Thus, unless the petitioner proved the CWA engaged in such activities or condoned the name-calling referred to by petitioner, there could be no finding by the lower court that the CWA had violated said section. In fact, the lower Court did weigh all the evidence presented and found the CWA, when made aware of employees' actions with regard to petitioner, made prompt and

reasonable efforts to see to it that this type of behavior ceased (A-7, A-8, A-11, A-12, A-15).

Hence, while certain *employees* at the Employer's Albany office may have engaged in horseplay with the petitioner, such behavior is *irrelevant* to petitioner's contention the CWA participated in such activities in violation of 42 U.S.C. §2000 e-2(c)(3).

While the CWA shares petitioner's belief all employees should enjoy the right to work free from discrimination, it does not believe, nor have the courts held labor organizations are liable for the actions of private citizens such as the employees at the Employer's Albany office. This is especially true when we consider the fact the CWA offered evidence, accepted and credited by the lower court, that it had always attempted promptly and reasonably to stop employees from bothering the petitioner. Certainly the Act did not require them to do more.

The cases of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *E.E.O.C.* v. *Kallir, Phillips, Ross, Inc.*, 401 F.Supp. 66 (S.D.N.Y. 1975); *Borela* v. *U.N. Corp.*, 462 F.2d 149 (10th Cir. 1972) and *Tramble* v. *Converters Ink Co.*, 343 F.Supp. 1350 (N.D. Ill. 1972), relied upon by petitioner, while correctly stated, are inapplicable to the present case. The lower court specifically considered and decided the various factual issues to which petitioner's arguments and these cases relate and rejected such claims as unsupported by the evidence. For instance, petitioner cites *Kallir*, *Borela* and *Tramble*, *supra* in support of his belief his demotion by the employer was a reprisal for his complaints of discrimination. The lower court specifically considered such contention and, based on all the evidence presented, ruled such demotion was for unsatisfactory work performance and not for reprisal (A-12, A-13). Such instance is indicative of petitioner's entire argument to this Court. Under such circumstances, we submit the lower court acted correctly in all respects.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

APPENDIX

CIVIL APPEAL SCHEDULING,
UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

MIGDAD MUSA JWAYYED,

Plaintiff-Appellant,

V.

BELL SYSTEM and their SUBSIDIARIES, NEW YORK TELEPHONE COMPANY & PACIFIC TELEPHONE & TELEGRAPH, COMMUNICATIONS WORKERS OF AMERICA UNION INTERNATIONAL, & DISTRICT ONE, LOCAL 1121,

Defendants-Appellees.

Docket No. 76-7300

Noting that Migdad Musa Jwayyed, appellant Pro-Se, has filed a Notice of Appeal, a Civil Appeal Pre-Argument Statement and Transcript Information, and being advised as to the progress of the appeal,

IT IS HEREBY ORDERED that the record on appeal be filed on or before July 27, 1976.

IT IS FURTHER ORDERED that the appellant's brief and the joint appendix be filed on or before September 6, 1976.

IT IS FURTHER ORDERED that the brief of the appellee be filed 30 days after the filing of the appellant's brief.

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed with the Clerk, but that the court may require as many as fifteen (15) additional copies before final disposition of the action.

Civil Appeal Scheduling,
United States Court of Appeals, Second Circuit

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of October 25, 1976.

IT IS FURTHER ORDERED that in the event of defautlt by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, the appeal may be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO
Clerk

/s/ VINCENT A. CARLIN
By Vincent A. Carlin
Chief Deputy Clerk

Dated July 1, 1976

For assistance in your case, please call (212) 791-1054.

REPLY AFFIDAVIT OF
STUART M. POHL
SWORN TO JULY 28, 1976

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MIGDAD MUSA JWAYYED

Plaintiff-Appellant

-vs-

BELL SYSTEM AND THEIR SUBSIDIARIES, NEW YORK TELEPHONE COMPANY, AND PACIFIC TELEPHONE & TELEGRAPH, COMMUNICATIONS WORKERS OF AMERICA UNION INTERNATIONAL, AND DISTRICT 1, LOCAL NO. 1121,

Defendants-Respondents

Civ. Action #74 CV 432 #T-6195

STATE OF NEW YORK }
COUNTY OF ERIE } SS:
CITY OF BUFFALO }

STUART M. POHL, being duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice before this Court and am an associate in the firm of LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, co-counsel for the CWA defendants in the above-entitled appeal, as well as in the proceedings held before the United States District Court for the Northern District of New York in this matter.

2. I make this affidavit in opposition to the plaintiff-appellant's application to have an attorney appointed for him by this Court.

Reply Affidavit of Stuart M. Pohl
Sworn to July 28, 1976

3. On page 2 of his application, sworn to on July 23, 1976, MIGDAD MUSA JWAYYED, under oath, says he is unable to afford and unable to find an attorney who will represent him in the present appeal. In addition, he swears he is presently unemployed, has not received any income within the past twelve months, from employment or other sources, and does not own any cash, savings accounts, real estate, stocks, bonds or the like.

4. While your deponent realizes the Court has discretion to appoint counsel for a party proceeding under Title VII of the Civil Rights Act, I feel it is my duty to inform this Court as to the accuracy of certain statements contained in MR. JWAYYED's affidavit.

5. At the time of the proceedings held before the United States District Court for the Northern District of New York, your deponent found it necessary to bring a motion for change of venue on behalf of the CWA defendants.

6. At the time of oral argument of the Motion for Change of Venue, held before the HON. EDMOND J. PORT, on May 4th, 1976, MR. JWAYYED personally appeared before the Court and represented to it the fact that he was employed as a travelling salesman earning a living and for that reason, did not care in which city the trial of the action would be held.

7. In addition, subsequent to the filing of this appeal, MR. JWAYYED has commenced another action against the same named defendants requesting relief based on many of the same acts alleged in the previously dismissed complaint which are the subject of the present appeal.

8. We believe it highly unjust for the various Federal Courts of this state to be abused by the plaintiff at the Court's expense.

Reply Affidavit of Stuart M. Pohl
Sworn to July 28, 1976

9. If the appellant truly believes himself aggrieved by the decision of the Lower Court in this case, we believe he should submit additional proof to the Court that he is in fact unemployed, and unable to afford to retain an attorney in this matter.

/s/ STUART M. POHL
STUART M. POHL

Sworn to before me this
28th day of July, 1976.

/s/ CHERYL A. HOOPLE
CHERYL A. HOOPLE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977